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"To Say the Greatest Matters in the Simplest Way": A "First Economic Injury" Rule as a Restatement of Directness Standing Requirements in Federal Antitrust Law

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"TO SAY THE GREATEST MATTERS IN THE SIMPLEST WAY"[1]: A "FIRST ECONOMIC INJURY" RULE AS A RESTATEMENT OF DIRECTNESS STANDING REQUIREMENTS IN FEDERAL ANTITRUST LAW

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Abstract: In addition to traditional constitutional standing analysis, federal antitrust law examines a potential plaintiff's claims under a series of specialized standing requirements. One of these requirements is that the plaintiff's injury be a "direct" result of the antitrust violator's misconduct. This requirement has been prominent in recent tobacco litigation where union health care trust funds sued the major tobacco companies in antitrust to recover the costs of treating nicotine-addicted beneficiaries. Federal courts generally denied standing to the trust funds for several reasons, one of which was the trust funds' failure to satisfy the directness requirements. This Comment analyzes the tests that the U.S. Supreme Court has used to determine whether a plaintiff's injuries are sufficiently direct to grant antitrust standing. It argues that these tests—the direct purchaser rule, the cost-plus contract exception, and the direct injury requirement—should be consolidated and restated as a "first economic injury" rule, under which standing is awarded, assuming other standing requirements are met, to the party that suffers the first economic impacts of the antitrust violation. This Comment concludes that although the courts may have properly denied standing to the trust funds for other reasons, the courts erred in declaring that the trust funds failed to satisfy any directness requirement.

"What is significant is not the tyranny of labels—direct vs. indirect purchaser, cost-plus vs. fixed-price contracts—but who has been directly damaged by the [antitrust violation]."[2]

Standing is usually a topic reserved for law school classes on constitutional law and other academic discussions. Occasionally, however, it arises as a central issue in cases of "enormous public interest and concern, in which great wrongs are alleged."[3] Since the early 1990s, private entities in increasing numbers have sued the major American tobacco companies in attempts to recoup the tremendous financial costs of smoking-related diseases.[4] Among these private entities are union health care trust funds, several classes of which have recently brought antitrust claims against the tobacco companies.[5] Despite the social and

1. Ralph Waldo Emerson, *Beauty*, in 6 *The Complete Works of Ralph Waldo Emerson* 279, 294 (1904).

2. Illinois v. Borg, 548 F. Supp. 972, 975 (N.D. Ill. 1982).

3. Service Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc., 83 F. Supp. 2d 70, 80 (D.D.C. 1999).

4. *See infra* note 117.

5. *See infra* note 117 and accompanying text.

political significance of these cases, the large investments of time and money by the parties, and the potential impact on other industries, these class actions turned largely on the underdeveloped and inconsistently applied doctrine of antitrust standing.[6]

Although standing in federal courts is always subject to traditional constitutional analysis,[7] antitrust law contains its own specific standing requirements. In its attempts to limit lucrative treble-damage actions under federal antitrust laws,[8] the U.S. Supreme Court has announced different tests[9] and policy considerations[10] for granting standing to private plaintiffs. Interpreting antitrust statutes that seemingly permit anyone injured to sue,[11] the Court has mandated, among other conditions,[12] that the plaintiff demonstrate that its injuries were proximately caused by the defendants' actions.[13] To establish proximate cause the plaintiff must demonstrate a "direct" connection between the antitrust violation and its injuries.

The Court has developed three particular manifestations of this directness requirement: the direct purchaser rule,[14] the cost-plus contract exception,[15] and the direct injury requirement.[16] It is difficult to decipher the meaning of these requirements outside the specific factual contexts of particular cases. Accordingly, in an atmosphere of uncertainty generated

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6. *See infra* notes 124–28.

7. *See infra* notes 23–24 and accompanying text.

8. *See* 15 U.S.C. § 15 (1994); *infra* notes 26–27 and accompanying text.

9. *See infra* notes 61–63.

10. *See infra* notes 45–47 and accompanying text.

11. *See infra* notes 26–27 and accompanying text. This Comment will address standing only for private antitrust plaintiffs seeking damages under section 4 of the Clayton Act. Public suits under the Sherman Act (*parens patriae* actions) are governed by the Hart-Scott-Rodino Act, 15 U.S.C. § 15c (1994) (suits by state attorneys general) and 15 U.S.C. § 15f (1994) (suits by U.S. Attorney General). Private suits seeking only injunctive relief are addressed in 15 U.S.C. § 26 (1994). Section 1 of the Sherman Act, 15 U.S.C. § 1 (1994), outlines substantive antitrust law and provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

12. The Court looks to other standing requirements in addition to proximate cause tests. *See infra* note 106.

13. This proximate cause analysis is only one of several tests that the Supreme Court generally applies in private antitrust actions. *See* Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 531–33 (1983); *see also* Reiter v. Sonotone Corp., 442 U.S. 330, 337–40 (1979) (injury to business or property requirement); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (antitrust injury requirement).

14. *See generally* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); *infra* Part I.A.

15. *See generally Illinois Brick*, 431 U.S. 720; *infra* Part I.B.

16. *See Associated General Contractors*, 459 U.S. 519; *infra* Part I.C.

by the Court's refusal to offer more concrete guidance,[17] the federal courts have been unable to apply consistently the Court's precedents and policies when faced with novel factual situations.

An analysis of the causal chains[18] and actual grants of standing in several prominent antitrust cases reveals an overriding theme in federal antitrust jurisprudence: courts consistently grant standing to the party that suffers the first economic impact of an antitrust violation.[19] This common theme, better expressed as a "first economic injury" rule, does not require that the plaintiff occupy any particular position in the causal chain or be in privity[20] with the antitrust violator and operates regardless of whether the plaintiff subsequently "passes on"[21] the costs of the antitrust violation.

Part I of this Comment examines the most influential U.S. Supreme Court and lower federal court precedents addressing directness as a requirement for antitrust standing, as well as the tests and policies they purport to administer in adjudging directness. Part II summarizes the holdings in recent litigation against the tobacco companies in which courts attempted to apply particular directness requirements in denying antitrust standing to classes of union health care trust funds. Part III explains the common theme of the U.S. Supreme Court's antitrust directness jurisprudence and proposes that the various directness tests applied by the Court be recast as a first economic injury rule. Part IV argues that the trust fund courts' rulings diverged from applicable U.S. Supreme Court precedent and contravened the proper application of the first economic injury rule.[22]

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17. *See, e.g., Associated General Contractors*, 459 U.S. at 536 n.33 ("[C]ourts should analyze each situation in light of the factors set forth . . . .").

18. This Comment uses the phrase "causal chain" to mean the causal connection between parties economically affected by an antitrust violation.

19. *See infra* Part III.

20. This Comment uses the term "privity" to mean an actual contractual relationship with the antitrust violator, rather than a more distant interest in the violator's misconduct. *Cf. Black's Law Dictionary* 1217–18 (7th ed. 1999) (defining privity as the "relationship between the parties to a contract").

21. *See infra* note 34.

22. In January 2000, the U.S. Supreme Court denied certiorari to the plaintiffs in three of the trust fund cases. *See infra* note 117. Supreme Court Rule 10(a) indicates that disagreement among the circuits weighs in favor of granting certiorari. In these cases, the Court's denial may have been inspired in part by the circuit courts' unanimous rejection of the trust funds' arguments. It is not clear how the U.S. Supreme Court may have ruled on specific standing issues in the trust fund cases.

I. PRIVATE ANTITRUST STANDING REQUIREMENTS

A plaintiff's right to sue for damages in federal courts is governed at the threshold by Article III, section 2 of the U.S. Constitution, which states that federal courts may hear only "Cases" or "Controversies."[23] That broad dictate is refined by a judicially developed standing requirement, under which the plaintiff must demonstrate "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[24]

In addition to universally applicable Article III requirements, federal antitrust law imposes its own limits on who may sue.[25] Section 4 of the Clayton Act,[26] which forms the starting point for private antitrust standing analysis, provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor."[27] Of the U.S. Supreme Court's various tests and policies limiting antitrust standing beyond the text of section 4,[28] one is the notion that a plaintiff's injury must be the direct result of an antitrust violation.[29] This directness requirement has manifested in three related U.S. Supreme Court doctrines: the direct purchaser rule, the cost-plus contract exception, and the direct injury test. The Court has traditionally

23. U.S. Const. art. III, § 2.

24. Allen v. Wright, 468 U.S. 737, 751 (1984).

25. *See* Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535 n.31 (1983) ("Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.").

26. 15 U.S.C. § 15 (1994).

27. 15 U.S.C. § 15. This facially broad language represents only the starting point for antitrust standing analysis of private plaintiffs. *See supra* note 11.

28. This Comment will address only the principles related to directness. Several other independent standing requirements also apply in private antitrust actions. *See infra* note 106 and accompanying text.

29. Although the most prominent cases discussing directness standing requirements in antitrust are relatively recent, the Court has long sought to limit damages to injuries proximately caused by the antitrust violator's conduct. *See* Southern Pac. Co. v. Darnell-Tanzer Lumber Co., 245 U.S. 531, 533 (1918) ("The general tendency of the law, in regard to damages at least, is not to go beyond the first step."); *see also* Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910) (denying stockholder standing for antitrust action because damages were "indirect, remote, and consequential"). *But cf.* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265–66 (1946) ("The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done.") (quoting Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 565 (1931)).

looked to the facts of each case when determining which of these directness tests it must apply.[30]

A. The Direct Purchaser Rule

Over the last thirty years, courts addressing price-fixing allegations[31] have applied a type of directness requirement known as the "direct purchaser rule."[32] The rule addresses the phenomenon of intermediaries[33] "passing on"[34] an antitrust overcharge[35] through the chain of commerce and limits treble-damage remedies to those parties that dealt directly with the antitrust violator. The "pass on" theory arises in two particular contexts.[36] "Offensive" passing on is a plaintiff's attempt to establish standing by demonstrating an injury passed through an intermediary.[37] "Defensive" passing on is a defendant's attempt to deny standing by demonstrating that the plaintiff escaped injury by passing on all damages.[38]

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30. *See Associated General Contractors*, 459 U.S. at 534–37.

31. *See* 2 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* 254–55 (rev. ed. 1995).

32. *See, e.g.*, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).

33. This Comment uses the term "intermediary" to mean any party that deals directly with an antitrust violator (usually a contractual relationship) and subsequently passes on the effects of the antitrust violation to another party. In this context, a "direct purchaser" is usually an intermediary that purchases goods directly from the antitrust violator, while an "indirect purchaser" subsequently purchases the goods from the intermediary—thus dealing with the antitrust violator only "indirectly." *Cf.* Herbert Hovenkamp, *The Indirect purchaser rule and Cost-Plus Sales*, 103 Harv. L. Rev. 1717, 1717 n.5 (1990).

34. *See* Areeda & Hovenkamp, *supra* note 31, at 255–56; Hovenkamp, *supra* note 33, at 1717; William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. Chi. L. Rev. 602, 602 (1979); Cynthia Urda Kassis, Comment, *The Indirect Purchaser's Right to Sue Under Section 4 of the Clayton Act: Another Congressional Response to* Illinois Brick, 32 Am. U. L. Rev. 1087, 1088 (1983). For a more thorough economic analysis of the pass-on theory than is possible in the context of this Comment, see generally Robert G. Harris & Lawrence A. Sullivan, *Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. Pa. L. Rev. 269 (1979); and Edmund H. Mantell, *Denial of a Forum to Indirect-Purchaser Victims of Price Fixing Conspiracies: A Legal and Economic Analysis of* Illinois Brick, 2 Pace L. Rev. 153 (1982).

35. In this Comment the term "overcharge" refers to the illegal cost increases resulting from an antitrust violation. *See* William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of* Illinois Brick, 67 Antitrust L.J. 1, 10–11 (1999).

36. *See* Areeda & Hovenkamp, *supra* note 31, at 256–58; Kassis, *supra* note 34, at 1088 nn.4, 7.

37. *See* Areeda & Hovenkamp, *supra* note 31, at 256–58; Kassis, *supra* note 34, at 1088 n.7.

38. *See* Areeda & Hovenkamp, *supra* note 31, at 256–58; Kassis, *supra* note 34, at 1088 n.4.

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,[39] the Court granted standing to a direct purchaser although that party passed on the entire overcharge to retailers and consumers.[40] Hanover, the plaintiff shoe manufacturer, alleged that the defendant had unlawfully monopolized the shoe machinery market, forcing manufacturers to lease rather than buy the defendant's equipment.[41] The defendant responded that Hanover was not the proper plaintiff because Hanover had escaped injury by passing on all alleged overcharges to retailers and consumers in the form of higher shoe prices.[42] The Court noted that regardless of any subsequent pass on by the direct purchaser, such a party has paid more for goods than it should have and thus may sue for treble damages.[43] In rejecting the defendant's pass-on argument, the Court held that direct purchasers are not stripped of antitrust standing merely because they pay for the overcharged item and *then* pass on the overcharge to a subsequent purchaser.[44]

The Court's rejection of the defensive use of pass-on theory was based on a number of concerns. The Court expressed worries that if it permitted indirect purchasers to sue, those parties "would have only a tiny stake in the lawsuit and little interest in attempting a class action."[45] According to the Court, this result would be unacceptable because the antitrust laws would go underenforced and antitrust violators would thereby retain their ill-gotten gains.[46] The Court also concluded that the potential difficulty of proving the amount of passed-on overcharges was significant enough to limit standing to parties that dealt directly with the antitrust violator.[47] The Court thus rejected the use of defensive pass-on theory,[48] but left open the question of offensive pass-on theory.

39. 392 U.S. 481 (1968).

40. *See id.* at 487–88.

41. *See id.* at 483.

42. *See id.* at 487–88.

43. *See id.*

44. *See id.* at 489 (noting that direct purchaser might increase prices in response to overcharge, and injuries from resulting sales volume loss militate in favor of granting standing to direct purchaser).

45. *Id.* at 494.

46. *See id.*

47. *See id.*

48. *See supra* note 34.

In the wake of *Hanover Shoe*'s pro-plaintiff rule, federal circuits experienced a surge in private antitrust actions[49] and differed in their application of the direct purchaser rule. By the mid-1970s, some courts permitted plaintiffs that had not dealt directly with antitrust violators to maintain section 4 actions,[50] despite academic and judicial commentary that granting plaintiffs exclusive use of the pass-on doctrine created an asymmetry with *Hanover Shoe*,[51] while other courts applied *Hanover Shoe* even-handedly, barring both plaintiffs' and defendants' use of the pass-on theory.[52]

In *Illinois Brick Co. v. Illinois*,[53] the Court addressed the split among the circuits and announced that basic equity demanded that the direct purchaser rule apply equally to plaintiffs and defendants.[54] The plaintiffs, the State of Illinois and several municipal government entities, sued a group of concrete block manufacturers for illegally fixing and maintaining prices.[55] The plaintiffs had used defendants' products in public construction projects, and claimed injury stemming from the inclusion of the defendants' overpriced products in the general construction bids.[56] Thus, even though the plaintiffs had not dealt directly with the antitrust violators, they argued that they were directly injured because the intermediary subcontractors had passed on all overcharges to them.[57] The Court rejected the plaintiffs' standing arguments based on the *Hanover Shoe* holding.[58]

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49. *See* Note, *The Effect of* Hanover Shoe *on the Offensive Use of the Passing-On Doctrine*, 46 S. Cal. L. Rev. 98, 98 & n.1 (1972).

50. *See, e.g.*, *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 197–98 (9th Cir. 1973) (permitting state and local government entities to recover asphalt overcharges by subcontractors included in final construction bids); West Virginia v. Pfizer & Co., 440 F.2d 1079, 1088 (2d Cir. 1971) (holding that state could use pass-on theory to recover on behalf of citizens because doctrine was being used as attempt to award damages "to those who ultimately paid higher prices as a result of the collusive pricing"); *In re* Master Key Antitrust Litig., 1973 Trade Cas. (CCH) ¶ 74,680, at 94,980 (D. Conn. Aug. 23, 1973) ("[*Hanover*] should not be used to erect a legal barrier to consumers who have managed to bring suit.").

51. *See* Note, *Standing to Sue in Antitrust Cases: The Offensive Use of Passing-On*, 123 U. Pa. L. Rev. 976, 988–90 (1975); *see also* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187, 1188 (3d Cir. 1971); Denver v. American Oil Co., 53 F.R.D. 620, 637 (D. Colo. 1971). *But see* Note, *supra* note 49, at 111–14.

52. *See, e.g.*, *Mangano*, 438 F.2d at 1188; *Denver*, 53 F.R.D. at 637 ("To try this case as a class action might be an accountant's paradise, but it would be a court's purgatory.").

53. 431 U.S. 720 (1977).

54. *See id.* at 729–31; *see also* Vincent A. Carrafiello, *A Search for Symmetry: The "Pass On" Issue in Quest of Determination*, 24 Antitrust Bull. 187, 192 (1979).

55. *See Illinois Brick*, 431 U.S. at 726–27.

56. *See id.*

57. *See id.* at 729–30.

Four reasons led to the majority's rejection of offensive use of passing-on theory.[59] First, as in *Hanover Shoe*, the direct-purchasers (the subcontractors in *Illinois Brick*) had paid for the overcharged goods out of their own coffers and only subsequently passed on the overcharge to the plaintiffs.[60] Second, the risk of multiple liability for antitrust defendants was too great and would make treble-damage actions overwhelmingly complex if indirect purchasers and direct purchasers could both sue for the same violations and claim the same damages.[61] Third, the Court recognized that the problems of proof and apportionment of damages that had troubled the *Hanover Shoe* Court would also persist in a plaintiff's passing-on case.[62] Finally, the Court repeated its concerns from *Hanover Shoe* that permitting indirectly injured parties to sue would lead to the ineffective enforcement of the antitrust laws.[63] Thus, the combined effect of the direct purchaser rule, as announced in *Hanover Shoe* and expanded in *Illinois Brick*, was to ban the use of the pass-on theory by both defendants and plaintiffs in private antitrust suits.

B. The Cost-Plus Contract Exception to the Direct Purchaser Rule

To ensure that the antitrust laws do not go underenforced, the Court in both *Hanover Shoe* and *Illinois Brick* discussed in dicta an exception to the direct purchaser rule, known as the "cost-plus contract exception," that would under limited circumstances grant standing to parties that had

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58. *See id.* at 728–29.

59. *See id.* at 728. Whether this case presents a decision on standing is unclear. The Court noted that "we do not address the standing issue, except to note . . . that the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4." *Id.* at 728 n.7. This distinction may be too fine for practical purposes:

> When [a "directness"] deficiency appears early in the case, courts often phrase the decision in "standing" terms; otherwise, they tend to speak simply of a failure of proof. The name we give a fatal deficiency in a plaintiff's suit does not matter, although "standing" is a convenient and comprehensive term emphasizing this bundle of issues other than the presence of a violation or an immunity.

Areeda & Hovenkamp, *supra* note 31, at 259.

60. *See Illinois Brick*, 431 U.S. at 726.

61. *See id.* at 730–31; *see also* Blue Shield v. McCready, 457 U.S. 465, 474–75 (1982).

62. *See Illinois Brick*, 431 U.S. at 731–32 (quoting Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 493 (1968)).

63. *See id.* at 741.

not dealt directly with the antitrust violator.[64] To qualify as a true cost-plus contract, and thus an exception to the direct purchaser rule, an agreement between the direct and indirect purchasers must be negotiated prior to the defendant's price-fixing activity and must specify both the amount of the direct purchaser's markup and the quantity to be delivered to the indirect purchaser.[65] Under these narrow conditions, courts can determine the indirect purchaser's injuries without relying on complex economic analyses of market elasticity[66] and implicating problems of efficient enforcement[67] and multiple liability.[68] Moreover, damages can be easily measured because pursuant to the contract, the direct purchaser automatically passes on all antitrust overcharges to the next party in line.[69] This exception did not apply in *Illinois Brick* and *Hanover Shoe* because the plaintiffs negotiated contracts with subsequent purchasers *after* the plaintiffs' dealings with the antitrust violator.[70]

Courts differed in their application of the cost-plus contract exception. For example, in *In re Beef Industry Antitrust Litigation*,[71] the Fifth Circuit granted standing to a class of cattle ranchers to sue retail food chains and grocers for allegedly conspiring to fix the price of beef purchases from intermediary wholesalers, thus forcing the plaintiffs to sell to the wholesalers at artificially depressed prices.[72] The wholesalers purchased the beef from plaintiffs and then sold it to defendants under a strictly adhered-to cost-plus system.[73] Assuming the plaintiffs' allegations were true, the court found that the wholesalers' "habitual use of predetermined formulae" for pricing in their purchases from the ranchers amounted to the "functional equivalent of cost-plus contracts,"[74] thus

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64. *See id.*, 431 U.S. at 736; Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968). This Comment will focus on the cost-plus contract exception, even though the *Illinois Brick* Court also suggested a "control" exception, in which the direct purchaser is wholly owned and/or controlled by the indirect purchaser. *See Illinois Brick*, 431 U.S. at 736 n.16.

65. *See Illinois Brick*, 431 U.S. at 736; *see also* Hovenkamp, *supra* note 33, at 1720.

66. *See Illinois Brick*, 431 U.S. at 731–32, 736.

67. *See id.* at 732 n.12.

68. *See id.* at 730.

69. *See id.* at 736; *Hanover Shoe*, 392 U.S. at 494.

70. *See Illinois Brick*, 431 U.S. at 743–46; *Hanover Shoe*, 392 U.S. at 491–94.

71. 600 F.2d 1148 (5th Cir. 1979).

72. *See id.* at 1154–55.

73. *See id.*

74. *Id.* at 1165. On remand, the court dismissed the ranchers' case because there was no proof of the alleged rigid pricing system. *See In re* Beef Indus. Antitrust Litig., 710 F.2d 216, 219–20 (5th Cir. 1983); *see also In re* Western Liquid Asphalt Cases, 487 F.2d 191, 197–98 (9th Cir. 1973) ("[S]tanding under § 4 of the Clayton Act is [not] limited exclusively to first-line purchasers unless

insulating them from injury. Although these contracts did not predate the antitrust violation and the plaintiffs never dealt directly with the defendants, the court was unconcerned about calculating damages and granted standing to the plaintiff ranchers.[75]

Other courts interpreted the cost-plus exception less liberally. In *Eastern Air Lines, Inc. v. Atlantic Richfield Co.*,[76] the plaintiff airline sued a seller of aviation fuel for alleged overcharges on jet fuel.[77] The fuel seller asserted in defense that the airline was not the proper plaintiff because the airline had passed on all overcharges to its passengers—allegedly through a cost-plus arrangement.[78] The court rejected the defendant's cost-plus contract argument because the fare increases occurred in response to increased gas prices and did not predate the contracts between the airline and its passengers.[79] The court noted that although airline passengers may have absorbed some of the illegal overcharge through increased fares, the airline was the proper plaintiff because it suffered a significant economic injury *before* passing it on to passengers.[80] In finding no cost-plus arrangement, the court declined to apply *In re Beef Industry*'s more flexible "functional equivalent" doctrine.[81]

In *Kansas v. Utilicorp United Inc.*,[82] the U.S. Supreme Court applied *Eastern Air Lines*' rigid interpretation of the cost-plus contract exception. A group of states on behalf of their residents claimed that the defendant gas suppliers overcharged public gas utilities, which then passed on 100% of the overcharge to the residents.[83] The Court held that the

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there is a pre-existing cost-plus contract."); Obron v. Union Camp Corp., 477 F.2d 542, 543 (6th Cir. 1973) (finding that where plaintiff purchased goods from defendant and immediately resold to consumers at cost plus five percent, this "drop-ship" method of distribution was "comparable to a 'pre-existing 'cost-plus' contract'"); Illinois v. Borg, 548 F. Supp. 972, 973 (N.D. Ill. 1982) ("[T]he facts of each relationship must be examined to see whether a cost-plus or equivalent arrangement takes the transaction out of the *Illinois Brick* rule . . . .").

75. *See In re Beef Indus.*, 600 F.2d at 1165.

76. 609 F.2d 497 (Temp. Emer. Ct. App. 1979).

77. *See id.* at 497.

78. *See id.*

79. *See id.* at 498.

80. *See id.*

81. *See id.* at 498–99 & n.1; *supra* note 74 and accompanying text; *cf. In re* Plywood Antitrust Litig., 655 F.2d 627, 639–41 (5th Cir. 1981) (distinguishing *In re Beef Industry*); Jewish Hosp. Ass'n v. Stewart Mechanical Enters., 628 F.2d 971, 975–77 (6th Cir. 1980) (same); Mid-West Paper Prod. Co. v. Continental Group, Inc., 596 F.2d 573, 577–78 (3d Cir. 1979) (rejecting cost-plus argument).

82. 497 U.S. 199 (1990).

83. *See id.* at 217–18.

contracts between consumers and the utilities did not qualify as cost-plus contracts[84] because even in cases of 100% pass on, the exception does not apply unless the pass on occurred under a pre-existing contract.[85]

The Court justified its holdings on several grounds. Despite the nearly complete pass on, the Court found that the overcharge injured the public utilities because consumers were not bound by contracts that predated the antitrust violation.[86] Because the utilities had paid for the overcharged gas and *then* passed on its costs in the absence of fixed-quantity contracts, the Court was convinced that if allowed to sue, consumers would need to employ complex market-force analyses to determine which party absorbed which part of the overcharge.[87] Finally, the Court noted the importance of the effective enforcement of federal antitrust laws.[88] The Court decided that public utilities had sufficient incentive to sue, even though they likely passed on all overcharges.[89] This enforcement policy was best served, the Court concluded, by granting standing to the public utilities—the party with the resources necessary to prosecute a massive antitrust action.[90]

C. The Direct Injury Requirement

In cases not implicating the direct purchaser rule and its cost-plus contract exception, the U.S. Supreme Court has established a direct

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84. *See id.* It is beyond the scope of this Comment to address the Court's rejections of the states' arguments that a specific exception to *Illinois Brick* should be created for regulated public utilities, and that the Hart-Scott-Rodino Act, 15 U.S.C. § 15c (1994), created an express cause of action for indirectly injured parties. *See Utilicorp*, 497 U.S. at 208–16, 219.

85. *See Utilicorp*, 497 U.S. at 208–09.

86. *See id.* at 209. The Court also implicitly rejected the "functional equivalent" doctrine of *In re Beef Industry:* "Even if we were to create an exception for situations that merely resemble those governed by [cost-plus] contract[s], we would not apply the exception here." *Id.* at 218; *see also* Areeda & Hovenkamp, *supra* note 31, at 261–62.

87. *See Utilicorp*, 497 U.S. at 218. The Court feared that these post-pass-on injuries would be too difficult to apportion if consumers were allowed to sue. *See id.* at 209; *see also* Lee J. Potter, Kansas and Missouri v. Utilicorp United, Inc.: *The Supreme Court Applies the* Illinois Brick *Rule to Regulated Utilities*, 69 N.C. L. Rev. 1041, 1046 (1991).

88. *See Utilicorp*, 497 U.S. at 214 (stating that "our interpretation of § 4 must promote the vigorous enforcement of the antitrust laws").

89. *See id.*; *see also* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

90. *See Utilicorp*, 497 U.S. at 215–17. ("Consumers may lack the expertise and experience necessary for detecting improper pricing by a utility's suppliers."); *see also* Areeda & Hovenkamp, *supra* note 31, at 262; Potter, *supra* note 87, at 1047 ("Even if [indirect purchasers] did discover illegal behavior, the small individual amounts at stake probably would be insufficient to entice retail customers into enduring the inconveniences of prolonged litigation.").

injury test[91] as part of the broad proximate cause requirement. This manifestation of the directness principle limits standing to plaintiffs with injuries flowing directly from the antitrust violation.[92]

In *Blue Shield v. McCready*,[93] the U.S. Supreme Court held that a plaintiff may be directly injured even when it does not participate in the discrete economic niche in which an antitrust violator operates. The plaintiff, a Blue Shield health plan subscriber, alleged that her insurer conspired with an organization of psychiatrists to deny reimbursement of medical bills for all visits to psychologists.[94] The plaintiff sued the insurer and the psychiatrists' organization for her unreimbursed psychologist bills.[95] She alleged that the insurer designed the conspiracy to reduce the patronage of clinical psychologists, thereby increasing and protecting the market share of higher-priced psychiatrists.[96]

Although the psychologists were the intended targets of the defendants' conspiracy,[97] the Court permitted McCready to sue because her discrete losses (in the form of medical bills) eliminated the risk of multiple liability: "McCready has paid her psychologist's bills; her injury consists of Blue Shield's failure to pay her."[98] The Court reasoned that McCready's psychologist could make no claim of injury arising from his treatment of her because plan subscribers like McCready were the only parties "out of pocket as a consequence of the plan's failure to pay benefits."[99]

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91. Such a direct injury test has not been immune from criticism. For example, in *Perkins v. Standard Oil Co.*, the Court stated:

> [Any direct/indirect] limitation is wholly an artificial one and is completely unwarranted by the language or purpose of the [price discrimination laws of the antitrust] Act. . . . [T]he competitive harm done . . . is certainly no less because of the presence of an additional link in this particular distribution chain from the producer to the retailer.

Perkins v. Standard Oil Co., 395 U.S. 642, 647–48 (1969); *see also In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 127 (9th Cir. 1973) ("Resurrecting notions of privity, this [directness] test thus arbitrarily forecloses otherwise meritorious claims simply because another antitrust victim interfaces the relationship between the claimant and the alleged violator.").

92. This rule is distinguishable from the direct purchaser rule in that it applies even in cases not involving price fixing or the purchase of goods. *See supra* notes 32–34 and accompanying text; *see also* International Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc., 196 F.3d 818, 828 (7th Cir. 1999).

93. 457 U.S. 465 (1982).

94. *See id.* at 467–68.

95. *See id.* at 468–69.

96. *See id.* at 469–70.

97. *See id.* at 478–79.

98. *Id.* at 475.

99. *Id.*

In response to defendants' arguments that McCready's injuries were too remote to grant standing because she was neither a target of the alleged conspiracy,[100] nor a participant in the economic market that had allegedly been restrained,[101] the Court applied a broad directness principle. McCready had standing simply because she was entitled to contractual benefits that had not been reimbursed.[102] Thus, although she neither participated in the market for group health plans nor was a target of the conspiracy,[103] her injury satisfied the direct injury requirement because it was "within the area of the economy" endangered by the defendants' antitrust violations.[104]

The most recent and thorough discussion of the direct injury requirement occurred one year later in *Associated General Contractors v. California State Council of Carpenters*.[105] In that case, the Court enumerated and explained the factors it would employ in all antitrust standing analyses and ruled that it would award standing only to plaintiffs whose injuries flowed directly from the antitrust violation.[106] In *Associated General Contractors*, the two plaintiff labor unions alleged that an association of building contractors had coerced several general contractors into dealing only with non-unionized subcontractors.[107] Unionized subcontractors, in turn, allegedly lost contracts and turned to non-union labor themselves.[108] The plaintiffs alleged that the contractors'

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100. *See id.* at 478–79.

101. *See id.* at 479–80.

102. *See id.* at 480.

103. *See id.* at 479 ("[R]emedy cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market.").

104. *Id.* (citing *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 129 (9th Cir. 1973)). This "area of the economy" test led some courts to rely on "the defendant's 'aim,' objective, or intention and to think of the target area as a zone covering those [injuries] within the intended or foreseeable effects of the defendant's violation." Areeda & Hovenkamp, *supra* note 31, at 236.

105. 459 U.S. 519 (1983).

106. This Comment discusses only the direct injury test announced in *Associated General Contractors*. *See id.* at 540–43. However, the Court also set forth at least three other distinct tests. First, it required some causal connection between the alleged antitrust violation and the plaintiff's injury, as defined by traditional notions of proximate cause. *See id.* at 537. Second, the Court's "antitrust injury" analysis required that the plaintiff establish that the injury be of the type that the antitrust laws were intended to prevent. *See id.* at 538–40; *see also infra* note 184. Finally, the Court noted that the plaintiff's alleged damages must not be "speculative." *Associated General Contractors*, 459 U.S. at 542–43; *see also* American Ad Management, Inc. v. General Tel. Co., 190 F.3d 1051, 1054–55 (9th Cir. 1999) (listing and applying *Associated General Contractors* factors); Areeda & Hovenkamp, *supra* note 31, at 194–96.

107. *See Associated General Contractors*, 459 U.S. at 520–21.

108. *See id.*; *see also* Areeda & Hovenkamp, *supra* note 31, at 196–97.

association was to blame for this diversion of work away from labor unions like themselves.[109]

After noting that Congress did not intend the antitrust laws to "encompass every conceivable harm that can be traced to alleged wrongdoing,"[110] the Court announced that one criterion for denying standing was "the directness or indirectness of the asserted injury."[111] Without clearly defining directness, the Court held that the *Associated General Contractors* plaintiffs' injury was insufficiently direct for standing.[112] Of primary importance to the Court was the existence of a more directly injured party:[113] if any injury resulted from the defendants' coercive practices, the unionized contractors and subcontractors (against whom the coercion was directed) felt such injuries more directly than the unions.[114]

II. THE HEALTH CARE TRUST FUND CASES

Private tobacco litigation has been one of the more prominent contexts in which the antitrust directness standing requirements have recently arisen. Over the last four years, classes of union health care trust funds[115] in several states have sued the major tobacco companies[116] to recover the costs incurred in treating nicotine-addicted beneficiaries.[117]

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109. *See Associated General Contractors*, 459 U.S. at 520–21.

110. *Id.* at 536.

111. *Id.* at 540.

112. *See supra* note 106 and accompanying text.

113. As in prior antitrust cases, the Court also cited policies including conservation of judicial resources, avoiding excessively complex actions, and ensuring that the antitrust laws were enforced. *See Associated General Contractors*, 459 U.S. at 544–45.

114. *See id.* at 542 & n.47; *see also* Service Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc., 83 F. Supp. 2d 70, 86 (D.D.C. 1999) ("[T]he Supreme Court has *never* ruled that a plaintiff's injuries are too remote without first identifying a plaintiff who was more directly injured . . . .").

115. In this Comment, "trusts" and "trust funds" refer to *all* plaintiffs in the trust fund cases unless otherwise indicated. *See, e.g.*, Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc., 23 F. Supp. 2d 771, 777 (N.D. Ohio 1998) ("The plaintiffs are nonprofit, union-sponsored tax-exempt trusts organized under the Employee Retirement Income Security Act . . . . The trusts provide medical or hospital care benefits to participants and their beneficiaries as an employee retirement income security program."); Texas Carpenters Health Benefit Fund v. Philip Morris, Inc., 21 F. Supp. 2d 664, 666 (E.D. Tex. 1998), *aff'd*, 199 F.3d 788 (5th Cir. 2000) ("The Funds are financed by withholding employee wages at amounts negotiated through collective bargaining . . . [and] administered by a board of trustees, drawn equally from representatives of both labor and management."). *See generally* 27 Am. Jur. 2d *Employment Relationship* §§ 77–82 (1996).

116. The major tobacco companies, commonly known as "The Big Six," include: Philip Morris, Inc.; R.J. Reynolds Tobacco Co.; Brown & Williamson Tobacco Corp.; Lorillard Tobacco Co.;

The trust funds patterned their substantive antitrust claim on the nationwide suit filed by the states' attorneys general.[118] The trust fund plaintiffs alleged that the defendant tobacco companies engaged in a conspiracy to deceive the public and health care providers, such as the trust funds, by misrepresenting the addictiveness of nicotine and suppressing the development of safer cigarettes.[119] More specifically, the trust funds alleged that this industry-wide agreement constituted "quality fixing" by the industry—a collusive agreement to manipulate the nicotine content of tobacco products to ensure addiction and avoid competition on the basis of relative safety.[120]

Liggett & Myers, Inc.; and American Tobacco Co., Inc. *See NY Becomes the 20th State to Sue Big Six Tobacco Companies*, Associated Press, Jan. 27, 1997, *available in* 1997 WL 4853609.

117. *See, e.g.*, International Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc., 196 F.3d 818 (7th Cir. 1999); Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 191 F.3d 229 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 799 (2000); Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 789 (2000); Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 912 (2000); *Service Employees*, 83 F. Supp. 2d 70; Arkansas Carpenters' Health & Welfare Fund v. Philip Morris, Inc., 75 F. Supp. 2d 936 (E.D. Ark. 1999); Rhode Island Laborers' Health & Welfare Fund v. Philip Morris, Inc., No. 97-500L, 1999 WL 619064 (D.R.I. Aug. 11, 1999) (report and recommendation on defendants' motions to dismiss); Northwest Laborers-Employers Health & Sec. Trust Fund v. Philip Morris, Inc., 58 F. Supp. 2d 1211 (W.D. Wash. 1999); Hawaii Health & Welfare Trust Fund for Operating Eng'rs v. Philip Morris, Inc., 52 F. Supp. 2d 1196 (D. Haw. 1999); Laborers' & Operating Eng'rs' Util. Agreement Health & Welfare Trust Fund v. Philip Morris, Inc., 42 F. Supp. 2d 943 (D. Ariz. 1999); Seafarers Welfare Plan v. Philip Morris, Inc., 27 F. Supp. 2d 623 (D. Md. 1998); Kentucky Laborers Dist. Council Health & Welfare Trust Fund v. Hill & Knowlton, Inc., 24 F. Supp. 2d 755 (W.D. Ky. 1998); *Iron Workers*, 23 F. Supp. 2d 771; *Texas Carpenters*, 21 F. Supp. 2d 664; New Jersey Carpenters Health Fund v. Philip Morris, Inc., 17 F. Supp. 2d 324 (D.N.J. 1998); Stationary Eng'rs Local 39 Health & Welfare Trust Fund v. Philip Morris, Inc., 1998-1 Trade Cas. (CCH) ¶ 72,167 (N.D. Cal. Apr. 30, 1998); Southeast Fla. Laborers Dist. Health & Welfare Trust Fund v. Philip Morris, Inc., 1998-1 Trade Cas. (CCH) ¶ 72,163 (S.D. Fla. Apr. 14, 1998).

118. *See International Bhd. of Teamsters*, 196 F.3d at 820–21; *Steamfitters*, 171 F.3d at 918. Most of the attorney general cases were brought in state court because they involved state antitrust and consumer protection claims as well as federal antitrust claims. *See generally* Texas v. American Tobacco Co., 14 F. Supp. 2d 956 (E.D. Tex. 1997); State v. Philip Morris, Inc., No. 1JU-97-915CI (Alaska Super. Ct. Oct. 9, 1998) (memorandum and order on defendants' motions to dismiss); State v. American Tobacco, Co., No. CV 96-14769 (Ariz. Super. Ct. May 27, 1997) (order on defendants' third joint motion to dismiss); State v. Philip Morris, Inc., No. CDV-97-306 (Mont. Dist. Ct. Sept. 22, 1998) (memorandum and order on defendants' motions to dismiss); State v. American Tobacco Co., No. 96-2-15056-8, 1996 WL 931316 (Wash. Super. Ct. Nov. 19, 1996) (order on defendants' joint motion to dismiss); State v. Philip Morris, Inc., No. 97-CV-328 (Wis. Cir. Ct. Mar. 17, 1998) (decision and order on defendants' motion to dismiss). Other health care payor entities similar to the trust funds also attempted cost recovery actions. *See, e.g.*, Regence Blueshield v. Philip Morris, Inc., 40 F. Supp. 2d 1179 (W.D. Wash. 1999); State v. Philip Morris, Inc., 551 N.W.2d 490 (Minn. 1996) (involving joint suit by the State of Minnesota and Blue Shield).

119. *See, e.g.*, *Laborers Local 17*, 191 F.3d at 232–33; *Oregon Laborers*, 185 F.3d at 961.

120. *See, e.g.*, *Oregon Laborers*, 185 F.3d at 961–62; *Texas Carpenters*, 21 F. Supp. 2d at 666.

As their primary antitrust standing argument, the trust funds alleged that they were the directly injured party, at least in terms of economic loss. The trusts claimed to have "borne the [economic] brunt of smoking-related health care costs" and sought to replenish their coffers by recovering for expenditures that they made as a result of the defendants' misconduct.[121] The trusts acknowledged that their beneficiaries (the smokers themselves) had suffered personal injuries flowing from the defendants' misconduct.[122] Nonetheless, the trusts maintained that the economic injury flowed directly to them because they were contractually obligated to pay the beneficiaries' health care costs.[123]

In their attempts to apply the U.S. Supreme Court's directness tests consistently, federal courts generally refused to accept the trust funds' standing arguments.[124] Led by the Third Circuit in *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*,[125] many courts found that the trust fund plaintiffs were "too remote" to recover for any damages sustained as a result of the alleged conspiracy.[126] The courts reasoned that the trusts' antitrust injuries were entirely derivative of

121. *Oregon Laborers*, 185 F.3d at 962.

122. *See Service Employees*, 83 F. Supp. 2d at 75–78 (detailing trust funds' allegations about health problems associated with smoking).

123. *See id.*; *Northwest Laborers*, 58 F. Supp. 2d at 1213. As an alternative theory, the plaintiffs in *Northwest Laborers* posited that their health care contracts with beneficiaries qualified as cost-plus contracts because the funds were contractually obligated to pay for all nicotine-related health care costs. The court summarily rejected this theory, holding that "the exception for cost-plus contracts . . . is inapplicable." *See id.* at 1216.

124. This Comment will focus on the courts' rejection of the trust funds' claims based on "directness" (or other like terminology, such as "remoteness" or "derivativeness"). *See, e.g.*, International Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc., 196 F.3d 818, 823–25 (7th Cir. 1999); Rhode Island Laborers' Health & Welfare Fund v. Philip Morris, Inc., No. 97-500L, 1999 WL 619064, at *2 (D.R.I. Aug. 11, 1999) (listing federal courts that have granted and denied standing to plaintiff trust funds); Laborers' & Operating Eng'rs' Util. Agreement Health & Welfare Trust Fund v. Philip Morris, Inc., 42 F. Supp. 2d 943, 950 (D. Ariz. 1999); Seafarers Welfare Plan v. Philip Morris, Inc., 27 F. Supp. 2d 623, 627 (D. Md. 1998). Besides the directness issue, courts found that the trusts had not sustained an injury to business or property, *see, e.g.*, Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 926 n.8 (3d Cir. 1999), and had not participated in the relevant market, *see, e.g.*, *Oregon Laborers*, 185 F.3d at 966–67. These additional standing requirements are beyond the scope of this Comment. *But see generally* Areeda & Hovenkamp, *supra* note 31.

125. 171 F.3d 912 (3d Cir. 1999).

126. *See, e.g.*, *International Bhd. of Teamsters*, 196 F.3d at 823; Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 191 F.3d 229, 238–40 (2d Cir. 1999); *Steamfitters*, 171 F.3d at 921; Hawaii Health & Welfare Trust Fund for Operating Eng'rs v. Philip Morris, Inc., 52 F. Supp. 2d 1196, 1198–200 (D. Haw. 1999).

personal injuries suffered by the smokers.[127] Overall, the Courts of Appeal that confronted the issue concluded that there was no direct link between the defendants' alleged misconduct and the plaintiffs' alleged injuries.[128]

III. THE FIRST ECONOMIC INJURY RULE IS CONSISTENT WITH THE DIRECTNESS STANDING DOCTRINES

Taken together, the direct purchaser rule, its cost-plus contract exception, and the direct injury requirement describe a particular type of private antitrust plaintiff to whom courts have consistently granted standing: the party with the first economic injury, regardless of that party's position in the chain of causation. Courts should acknowledge that this common theme unites the existing directness tests and should clarify federal antitrust jurisprudence by explicitly adopting a first economic injury rule. This first economic injury rule is consistent with each of the major policy concerns that underlie existing antitrust directness requirements.

The first economic injury rule is easily explained: the party in the causal chain to suffer the first economic effects of an antitrust violation has standing to sue; all subsequently harmed parties are denied standing even when the entire overcharge is subsequently passed on to them. In other words, the courts should grant standing to the first party injured as a result of the antitrust violation. As illustrated below in Table 1, the first economic injury rule is consistent with the courts' grant of standing in a variety of antitrust contexts.

127. *See, e.g.*, *Oregon Laborers*, 185 F.3d at 964 (finding that although smokers could raise antitrust claims, lack of suitable plaintiff did not "necessarily lead to the conclusion that [the trust funds] must therefore have standing"); *see also* Stationary Eng'rs Local 39 Health & Welfare Trust Fund v. Philip Morris, Inc., 1998-1 Trade Cas. (CCH) ¶ 72,167, at 82,077–79 (N.D. Cal. Apr. 30, 1998).

128. *International Bhd. of Teamsters*, 196 F.3d at 823–25; *Laborers Local 17*, 191 F.3d at 239; *Oregon Laborers*, 185 F.3d at 964–65; *Steamfitters*, 171 F.3d at 927–28. *But see Service Employees*, 83 F. Supp. 2d at 86; Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc., 23 F. Supp. 2d 771, 793 (N.D. Ohio 1998) ("[T]he Court finds no more directly injured victims who could bring antitrust claims, first, because the antitrust laws do not allow an action for personal injury [thus excluding smokers], and second, because plaintiffs-funds are better positioned to make such claims.").

TABLE 1

CASE	ALLEGED ANTITRUST VIOLATOR(S)	FIRST PARTY(S)	SECOND PARTY(S)	THIRD PARTY(S)
Hanover Shoe	Shoe Machine Manufacturer	**Shoe Manufacturer***	Retailers	Customers
Illinois Brick	Brick Manufacturers	**Subcontractors***	General Contractors	State Plaintiffs
Utilicorp	Gas Suppliers	**Public Gas Utilities***	Gas Customers	---
Eastern Air Lines	Gas Co.	**Airline***	Passengers	---
Associated General Contractors	Contractors' Association	General Contractors	**Unionized Subcontractors***	Plaintiff Unions
McCready	Blue Shield & Psychiatrists	Employer (Health Plan Purchaser)	**Health Plan Member***	Psychologists
In re Beef Industry	Retail Beef Purchasers	Wholesale Beef Purchasers	**Ranchers and Stockyards***	---
Trust Funds	Tobacco Companies	Smoker Beneficiaries	**Trust Funds***	---

* Indicates parties that would be granted antitrust standing under the first economic injury rule, assuming other standing requirements are met.

☐ Indicates parties that were granted standing.

A. *The First Economic Injury Rule Is Consistent with the Direct Purchaser Rule*

The first economic injury rule is consistent with the direct purchaser rule developed in *Hanover Shoe* and *Illinois Brick*.[129] Although the Court gave different reasons for its standing rulings in both cases,[130] it granted standing to the party with the first economic injury. In *Hanover*, although the shoe manufacturer plaintiff may have passed on a portion of the overcharge to retailers and consumers,[131] it suffered the *first* loss as a result of the defendant's monopolistic practices. Similarly, it was the concrete subcontractors in *Illinois Brick* who actually purchased the overcharged concrete from the defendants.[132] The Court correctly denied standing to the government entity plaintiffs because the subcontractors' status as the first economically injured party did not change when the subcontractors included these costs in their construction bids. In both

129. *See supra* Part I.A.

130. *See supra* notes 46–47, 59–63, and accompanying text.

131. *See* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 487–88 (1968).

132. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 726 (1977).

cases, the Court's grant of standing is consistent with the first economic injury rule.

Permitting only the party with the first economic injury to sue—regardless of whether or not the party dealt directly with the antitrust violator—also achieves the policy goals of both *Hanover Shoe* and *Illinois Brick*.[133] These policy concerns include the risk of multiple liability, the efficient enforcement of the antitrust laws, and the complex apportionment of damages among injured parties. Indeed, proving how much of the overcharge the *Illinois Brick* subcontractors (the parties with the first economic injury) eventually passed on would have been exceedingly difficult.[134]

B. The Direct-Purchaser/Cost-Plus Contract Exception Dichotomy Is Unnecessary Because Both Doctrines Operate Together to Support the First Economic Injury Rule

The direct-purchaser and cost-plus contract doctrines both award standing to the party with the first economic injury. Accordingly, the latter is best described not as an exception to the direct purchaser rule, but as evidence that the direct purchaser rule is only one component of the first economic injury rule. Under *Illinois Brick*, the cost-plus contract doctrine illustrates that the injured party under section 4 of the Clayton Act[135]—and thus the party with standing—is the party with the first economic injury. When the indirect party agrees to accept whatever overcharges may appear through the cost-plus contract, it incurs the first economic injury and thus has standing regardless of its position in the causal chain.[136] Although the direct purchaser is in privity with the antitrust violator, it is insulated from harm by the automatic pass-on contained in a cost-plus contract.[137] By not requiring that the plaintiff be in privity with the antitrust violator,[138] the cost-plus contract doctrine indicates that the identification of the party with the first economic injury

133. *See supra* notes 59–63 and accompanying text.

134. *See Illinois Brick*, 431 U.S. at 742–43.

135. *See supra* notes 26–27 and accompanying text.

136. *See supra* Table 1.

137. *See supra* notes 64–70 and accompanying text.

138. In fact, there has never been any privity requirement in antitrust law, and courts have expressly declined to apply such a requirement. *See, e.g.*, Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969); *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 197 (9th Cir. 1973) ("Privity is not required in antitrust cases."); *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 127 (9th Cir. 1973).

is at the heart of the Court's directness standing jurisprudence. Thus, when the Court rules that the direct purchaser alone may sue—unless that purchaser is insulated from economic injury by a cost-plus contract—dividing such a holding into two distinct doctrines is unnecessary.

The interpretation of the cost-plus contract exception as a component of the first economic injury rule satisfies the policy objectives of *Illinois Brick* on two levels. First, there is no difficulty in apportioning damages between direct and indirect purchasers when the direct purchaser is contractually obligated to pass on 100% of the overcharge to the indirect purchaser.[139] Second, permitting indirect purchasers to sue under cost-plus contracts does not threaten to diminish the effective enforcement of the antitrust laws because the party that has incurred the first economic injury will be the most highly motivated to sue.[140]

In re Beef Industry and *Eastern Air Lines* also illustrate that the direct-purchaser and cost-plus contract doctrines are both components of the first economic injury rule and operate together to support the rule.[141] In *In re Beef Industry*, the court reasoned that the parties with the first and only economic injury were the cattle ranchers.[142] The intermediaries that dealt directly with the alleged conspirators were not the appropriate plaintiffs because they were insulated by their cost-plus arrangements with the ranchers.[143] Thus, the intermediaries suffered no economic injury. Similarly, the court in *Eastern Air Lines* permitted the airline to sue, despite its having passed on much of the overcharge to its

139. *See Illinois Brick*, 431 U.S. at 736; Hovenkamp, *supra* note 33, at 1723; *see also* Joseph H. Andersen, *A Legal and Economic Analysis of the Cost-Plus Contract Exception in* Hanover Shoe *and* Illinois Brick, 47 U. Chi. L. Rev. 743, 752–53 (1980) ("The [cost-plus] contract thus 'circumvent[s] complex market interactions' of supply and demand that normally make it impossible to trace the effects of an overcharge. The contract makes it 'easy to prove' that the direct purchaser did not absorb any of the overcharge and hence was not damaged.") (footnotes omitted); *cf. In re Western Liquid*, 487 F.2d at 197–99 (permitting parties like dismissed plaintiffs in *Illinois Brick* to sue, despite fact that direct purchasers had passed on overcharge through variety of cost-plus arrangements that did not technically qualify as cost-plus contracts).

140. *See, e.g.*, Elmer J. Schaefer, *Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 Wm. & Mary L. Rev. 883, 917 (1975) (explaining how cost-plus contract doctrine preserves vitality of private antitrust actions); *cf.* Thomas W. Dunfee, *Privity in Antitrust:* Illinois Brick v. Illinois, 16 Am. Bus. L.J. 107, 114 (1978) (noting that indirect purchasers are much more likely to sue than direct purchasers when latter's losses are passed on under cost-plus contract).

141. *See supra* notes 71–74, 76–80, and accompanying text.

142. *See In re* Beef Industry Antitrust Litig., 600 F.2d 1148, 1165 (5th Cir. 1979).

143. *See id.*

passengers through increased fares,[144] because the potentially enormous loss in fuel costs was the first economic impact of the overcharge. The cases' varying liberal and conservative applications of the cost-plus contract doctrine[145] do not undermine their support of that doctrine as a part of the first economic injury rule.

Finally, the *Utilicorp*[146] Court's affirmation of the cost-plus contract exception in the context of its application of the direct purchaser rule further demonstrates that the direct purchaser rule/cost-plus contract dichotomy is unnecessary. Because the public utilities had paid an artificially inflated price for the gas before passing on their costs to consumers under variable quantity contracts,[147] the Court refused to find a cost-plus contract.[148] However, the five-justice majority explicitly affirmed the continuing vitality of the cost-plus exception.[149] Citing *Illinois Brick*'s and *Hanover Shoe*'s discussions of the cost-plus contract exception, the Court indicated that the direct purchaser rule would apply unless the direct purchaser bears no portion of the overcharge and otherwise suffers no injury.[150] Thus, the direct purchaser rule applies only when the direct purchaser suffers the first economic injury flowing from the antitrust violation. If the direct purchaser escapes unscathed from its dealings with the antitrust violator, the cost-plus contract exception may step in to award standing to the next injured purchaser in the causal chain. This uneven rule/exception landscape is leveled by the simpler first economic injury rule.

C. *The First Economic Injury Rule Is Consistent with the Direct Injury Requirement*

The U.S. Supreme Court's discussion and application of the direct injury requirement in both *McCready* and *Associated General Contractors* should be understood as advancing a single underlying principle: the party who suffers the first economic effects of an antitrust violation has standing, assuming other standing requirements are met.[151]

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144. *See* Eastern Air Lines, Inc. v. Atlantic Richfield Co., 609 F.2d 497, 498 (Temp. Emer. Ct. App. 1979).

145. *See supra* notes 74–75, 81, and accompanying text.

146. 497 U.S. 199 (1990).

147. *See id.* at 209.

148. *See id.* at 218.

149. *See id.*; *supra* notes 82–86 and accompanying text.

150. *See Utilicorp*, 497 U.S. at 218.

151. *See supra* note 106.

Although McCready was not the target of the conspiracy between Blue Shield and the psychiatrists,[152] the Court granted standing because Blue Shield's failure to pay her psychologist's bills[153] constituted the first economic injury. The alleged conspiracy could have reduced the market share of psychologists by diverting plan members like McCready towards psychiatrists,[154] but this injury would have followed her economic loss.[155] Similarly, in *Associated General Contractors* any injury that the plaintiff unions suffered would have been secondary to that of the unionized subcontractors who supposedly lost bids because they used union employees.[156] Therefore, as illustrated in Table 1, the unionized subcontractors were the only party in *Associated General Contractors* that could have suffered the first economic injury.

The first economic injury rule also advances the primary policy concerns of the *McCready* and *Associated General Contractors* Courts. The *McCready* Court's chief policy concerns were preventing double damage recovery[157] and providing relief to victims of antitrust violations.[158] These policy goals and the test the Court used require that a plaintiff demonstrate that it suffered the first economic injury. McCready was the only party that had suffered an economic injury that could be "ascertained to the penny."[159] This injury was the first detrimental economic effect of the conspiracy. As for the *Associated General Contractors* Court's concerns, granting standing to plaintiffs who suffer the first concrete economic injury resulting from an antitrust violation ensures that antitrust actions in district courts will proceed as simply and manageably as possible.[160] Further, because only one injured party may sue, courts will not have to apportion damages or face duplicative claims.[161] Finally, the first economic injury rule encourages the enforcement of the antitrust laws by providing would-be plaintiffs with a simple

152. *See* Blue Shield v. McCready, 457 U.S. 465, 480 (1982).

153. *See id.* at 475.

154. *See id.*

155. *See supra* Table 1.

156. *See* Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 541–42 (1983) ("If either these [contractor] firms, or the immediate victims of coercion by defendants, have been injured by an antitrust violation, their injuries would be direct and, as we held in *McCready* . . . they would have a right to maintain their own treble-damage actions . . . .").

157. *See McCready*, 457 U.S. at 475.

158. *See id.* at 472.

159. *Id.* at 475 n.11.

160. *See Associated General Contractors*, 459 U.S. at 544–45.

161. *See id.*

and predictable directness test. Despite the different terminology and policies the Court advanced to support its holdings, a single class of plaintiffs—those who experience the first economic impacts of the antitrust violation—qualifies for standing under the tests employed by both *McCready* and *Associated General Contractors*.

In sum, the Supreme Court's major antitrust standing precedents to date—*Hanover Shoe*, *Illinois Brick*, *McCready*, *Associated General Contractors*, and *Utilicorp*—have used different tests to analyze the directness of an antitrust plaintiff's injury in a variety of factual contexts. The common theme that emerges is the grant of antitrust standing to the party that incurs the first significant economic injury.

IV. APPLICATION OF THE FIRST ECONOMIC INJURY RULE DEMONSTRATES THAT THE TRUST FUNDS WERE DIRECTLY INJURED

Under the first economic injury rule, the tobacco companies' conspiracy directly injured the union health care trust funds. Instead of recognizing that the application of any directness standing principle depends on whether the plaintiff suffered the first economic injury, the tobacco decisions essentially applied an artificial privity requirement[162] unsupported by precedent. In so doing, the courts misapplied both the first economic injury rule and the antitrust standing precedent on which it is based. Although the courts may have appropriately denied standing to the trust funds based on other factors, they erred in holding that the trust funds were not directly injured.

A. The Trust Funds Satisfied the First Economic Injury Test

The trust funds pass muster under the first economic injury test as it applied in *Hanover Shoe* and *Illinois Brick*. Assuming the tobacco companies' alleged antitrust violations caused an economic injury,[163] the first economic impact of their antitrust violation was the costs that the trust funds were contractually obligated to pay on behalf of their smoking beneficiaries. In both *Hanover Shoe* and *Illinois Brick*, the Court granted standing to the party who suffered the first economic

162. *See supra* note 138.

163. The courts did not enter any findings of fact on this issue in the trust fund cases. This Comment assumes that the trust funds could establish such a causal connection. It is critical to recognize that this "causal connection" analysis is distinct from directness of injury. *See Associated General Contractors*, 459 U.S. 519, 537, 540–42 (applying each test separately).

injury.[164] Similarly, the physically injured smokers did not bear the financial costs of medical care for their nicotine addiction because of their contracts with the health care trust funds.[165] Accordingly, no party in the causal chain was economically injured due to the tobacco companies' alleged misconduct before the trust funds' expenditures. Thus, under a first economic injury analysis, the trust funds are the proper plaintiffs, at least with regard to directness.[166]

The trust funds' directness argument also finds support in the first economic injury rule, as it would apply in both *In re Beef Industry*[167] and *Eastern Air Lines*.[168] In keeping with the rulings in those cases,[169] each individual health care contract in the trust fund cases was negotiated before the beneficiary suffered any nicotine-related injuries, and those contracts explicitly allocated costs, prevented any difficulty in allocating damages, and eliminated problems in proving if and how much of the costs of an antitrust violation each party absorbed.[170] Under a first economic injury analysis, the courts' rulings ignored the nature of the contractual relationship between the smokers and the trust funds. Although the trust funds never purchased anything from their beneficiaries or the defendants[171] and were not in privity with the antitrust violator,[172] the trust funds' contractual obligations ensured that no smoker would bear the medical costs of treating nicotine addiction and related health problems.[173] Moreover, in keeping with the policy

164. *See supra* notes 129–30 and accompanying text.

165. It would be disingenuous to claim that diseases related to nicotine addiction do not economically impact smokers as well. The smokers themselves suffer, among many other things, lost wages, decreased life span, and loss of consortium with loved ones. *See, e.g.*, International Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc., 196 F.3d 818, 824 (7th Cir. 1999). This Comment purports only to deal with the actual health care expenditures paid for under the pre-existing contracts between the smoker beneficiaries and the trust funds.

166. Again, it is beyond the scope of this Comment to analyze whether the courts properly denied standing to the trust funds on other grounds. The first economic injury rule demonstrates only that they should not have been denied standing on the basis of directness.

167. 600 F.2d 1148 (5th Cir. 1979).

168. 609 F.2d 497 (Temp. Emer. Ct. App. 1979).

169. *See supra* notes 71–81 and accompanying text.

170. *See supra* notes 64–69 and accompanying text.

171. As demonstrated by the facts of *Associated General Contractors*, there is no requirement that the plaintiff actually purchase anything from any other party. *See supra* notes 107–09 and accompanying text; *see also supra* note 138.

172. *See supra* note 138; *see also supra* Table 1.

173. This argument assumes that the trust funds could establish a causal connection between the defendants' malfeasance, the smokers' addictions, the related injuries, and the funds' subsequent expenditures. The difficulties in proving such a connection lie beyond the scope of this Comment.

considerations of *Eastern Air Lines* and *Utilicorp*, the party with the first economic injury (the trust funds in this case) is the party best equipped to prosecute a massive private action and ensure that the antitrust laws are enforced effectively.[174]

B. *The Courts Misapplied Antitrust Standing Precedent and Ran Afoul of the First Economic Injury Rule by Ruling that the Trust Funds Were Not Directly Injured*

The trust funds also satisfy the direct injury rule and first economic injury rule as it would apply in *McCready*[175] and *Associated General Contractors*.[176] Like the plaintiff in *McCready*, the trust funds made expenditures that were triggered by the upstream parties' inability to purchase a product untainted by conspiracy. Just as the psychologists could not sue in *McCready* because the patient had incurred the first economic injury,[177] the smokers in the trust fund cases never paid for their medical treatment resulting from nicotine addiction.[178] The *McCready* Court emphasized that granting standing to the plan participant did not implicate the apportionment and complexity concerns of *Illinois Brick* because the health care plan fixed her damages and permitted the courts to ascertain those damages "to the penny."[179] Similarly, the health care plans used by the trust funds would permit courts to pinpoint, with *McCready*-like certainty, the expenses related to nicotine addiction.[180]

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174. Two circuits expressly noted that smokers themselves would or could not bring an action against the tobacco companies under the federal antitrust laws. *See* Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957, 964 (9th Cir. 1999); Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 927 (3d Cir. 1999).

175. 457 U.S. 465 (1982).

176. 459 U.S. 519 (1983).

177. *See McCready*, 457 U.S. at 472 & 475 n.11; *supra* notes 152–54 and accompanying text.

178. *See supra* note 165.

179. *See supra* note 159 and accompanying text.

180. *Cf.* Blue Cross & Blue Shield United v. Marshfield Clinic, 65 F.3d 1406 (7th Cir. 1995). Writing for the majority, Chief Judge Posner explained, "Blue Cross paid Marshfield Clinic directly, in accordance with Blue Cross's contractual obligations to its insureds, and if it paid too much because the Clinic violated the antitrust laws then it ought to be allowed to sue to recover these damages." *Id.* at 1414–15. Unlike the trust fund cases, *Marshfield* involved the payment of health care expenses directly to the antitrust violator. *See id.* at 1408–09. Nonetheless, the case demonstrates that plaintiffs can recover health care expenses induced by antitrust violations. *But see* International Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc., 196 F.3d 818, 826–27 (7th Cir. 1999) (holding that *Marshfield* has no application to trust funds).

The *McCready* holding indicates that courts should grant standing to the party with the first economic injury, regardless of whether that party is the precise target of the defendants' conspiracy.[181] Despite this mandate, the trust fund courts failed to recognize that the trust funds were directly injured even though the actual targets of the tobacco companies' conspiracy may have been smokers.[182] For example, the Third Circuit distinguished *McCready* by finding that, unlike the plaintiff in *McCready*, the trust funds did not participate in the market affected by the alleged antitrust violations.[183] Although this holding demonstrates that the trust funds' injuries may not have been of the type that the antitrust laws intend to prevent,[184] it does not address or call into question whether or not the funds suffered the first economic injury.[185]

The trust funds' standing arguments also find support in the *Associated General Contractors* decision, in that no more directly economically injured parties are interposed between the trust funds and the antitrust violators.[186] In both *Associated General Contractors* and the trust fund cases, the proper plaintiff absorbed the economic injury despite the presence of an intermediary party that may have known of the alleged conspiracy.[187] The proper plaintiffs also occupied a downstream position in the causal chain and did not purchase anything from the antitrust violator.[188] In light of a first economic injury rule that satisfies each of the policy concerns of the *Associated General Contractors* Court[189] and the similarity between the causal chains in both cases, the courts erred in declaring the trust funds too remote to sue and recover damages.

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181. *See supra* notes 152–55 and accompanying text.

182. *See supra* notes 100–04 and accompanying text.

183. Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 922–23 (3d Cir. 1999).

184. This "antitrust injury" analysis is analytically distinct from the directness requirements at issue in this Comment. Although "the tests for antitrust injury and for reasonable proximity are not entirely separable, . . . clear thinking" about antitrust standing requires addressing directness and antitrust injury analyses separately. Areeda & Hovenkamp, *supra* note 31, at 237; *see also* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

185. *Cf.* Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957, 964 (9th Cir. 1999) (holding that smokers could not sue in antitrust, thereby implicitly acknowledging that there is no more directly economically injured plaintiff than trust funds for purposes of antitrust standing).

186. *See* Service Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc., 83 F. Supp. 2d 70, 86–87 (D.D.C. 1999).

187. *See supra* notes 121–23, 156.

188. *See supra* notes 107–09, 121–23.

189. *See supra* notes 160–61 and accompanying text.

The *Steamfitters* holding that the trust funds' injuries were indirect under the *Associated General Contractors* test[190] misapplied that Court's construction of private antitrust standing requirements. After the Court noted that "more directly injured parties existed in [*Associated General Contractors*, but] this is not necessarily the case here,"[191] the Third Circuit improperly coupled this assertion with a discussion of the causal connection between the defendants' alleged misconduct and the trust funds' injuries.[192] This analysis incorrectly conflated two distinct tests from *Associated General Contractors*;[193] the *Associated General Contractors* Court expressly noted that the "causal connection" and "directness of injury" factors are distinct parts of the general proximate cause analysis.[194] Thus, the *Steamfitters* court disregarded traditional directness analysis and its simpler manifestation—the first economic injury rule.

In sum, the reasons that the courts misapplied antitrust standing precedent and the first economic injury rule when they denied standing to the trust funds are twofold. First, like the proper antitrust plaintiff in each of the major antitrust standing cases, the trust funds suffered the first economic injury resulting from the alleged antitrust violation—regardless of their position in the causal chain or their lack of privity with the antitrust violator. Second, a factual comparison of the causal chains in the major antitrust standing precedents[195] demonstrates that the nature of the trust funds' claims did not differ materially from those in the precedents.

V. CONCLUSION

The U.S. Supreme Court's unwillingness to define directness more clearly as it applies to antitrust standing has left the federal judiciary ill-equipped to evaluate new approaches to private antitrust enforcement by plaintiffs like the trust funds. While the current mixed bag of directness tests applied by federal courts permits a case-by-case analysis of private plaintiffs' claims, it also fosters the type of misapplication that plagued

190. *See* Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 927–28 (3d Cir. 1999).

191. *See id.* at 927. The *Steamfitters* court also found that the trust funds claims presented no danger of multiple liability or difficult damage apportionment. *See id.* at 928–29.

192. *See id.* at 927–28.

193. 459 U.S. 519, 537, 540–42 (1983); *supra* note 163.

194. *See Associated General Contractors*, 459 U.S. at 537, 540–42.

195. *See supra* Table 1.

the trust fund decisions. The courts may have properly denied standing to the trust funds on other grounds, but it is demonstrative of the confusion over standing and directness that nearly every court facing the issue ruled that the trust funds were not directly injured for purposes of antitrust standing. Antitrust law is, by its nature, focused on the *economic* effects of an antitrust violation. At least with regard to directness, these trust fund decisions contravened antitrust standing precedent by employing a disfavored privity requirement rather than conventional directness analysis.

Insofar as the U.S. Supreme Court has declined to address this issue in the context of the trust fund decisions, the matter awaits resolution for another day. When presented with another opportunity, the Court should reevaluate the descriptions and practical effects of its antitrust standing doctrine, particularly its directness principles. A more predictable and easily applicable directness test would engender greater consistency of results in the district and circuit courts without infringing on the multi-factor analysis espoused by the Court in *Associated General Contractors*. Adoption of the first economic injury rule in place of current directness tests would better capture the sum and substance of the Court's antitrust standing jurisprudence by ensuring both the consistent and predictable application of its directness principles and the effective and efficient enforcement of federal antitrust laws.